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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 18 2006

EAC 05 182 51901

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as an Avionics Radar Specialist with the U.S. Army. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the director erred in finding that the submission of an uncertified ETA Form 9089 reflected that the petitioner no longer sought a national interest waiver. The director, however, did make a finding regarding the petitioner's eligibility for a national interest waiver. Thus, the director's implication that the petitioner may have abandoned this request does not constitute reversible error.

Counsel further asserts that the petitioner is eligible for the national interest waiver based on counsel's own interpretation of the relevant statute and regulation. Counsel asserts that the regulations provide little guidance and are "hairsplitting" and "byzantine." Counsel notes that the regulations have not been amended since Congress added the advanced degree professionals to the class of aliens eligible for the waiver. Counsel fails to acknowledge that in 1998, after advanced degree professionals became eligible, this office issued a comprehensive precedent decision interpreting the national interest waiver provision, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Comm. 1998). Precedent decisions are binding on all officers of Citizenship and Immigration Services (CIS). 8 C.F.R. § 103.3(c). Further, this decision has been upheld in federal court as a reasonable and predictable interpretation of the relevant statute. *Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). The director referenced the relevant precedent decision in both the request for additional evidence and the final notice of denial. While counsel briefly addresses the two most basic elements of eligibility set forth in the precedent decision, he fails to address the third and most involved element. For the reasons discussed below, the petitioner has not overcome the director's concerns.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially

> benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

On appeal, counsel asserts that the petitioner is an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Master's degree in Aerospace Engineering from the Embry-Riddle Aeronautical University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. at 215, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner proposes to work in an area of intrinsic merit, maintenance of U.S. Army radar, communications, navigation and flight control equipment on aircraft. Counsel asserts without explanation that the benefits will be national in scope. Clearly, the military as a whole benefits the national interest on a national level. We note, however, the following discussion:

> [P]ro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Matter of New York State Dep't of Transp., 22 I&N Dec. at 217, n.3. Similarly, while the maintenance of military equipment is in the national interest, the benefits of a single soldier are too attenuated at the national level. Congress is capable of identifying a specific occupation, such as physicians in underserved areas, that warrant a waiver of the alien employment certification in the national interest despite the negligible national impact of each member of the occupation. Section 203(b)(2)(B)(ii) of the Act. Congress has not enacted a similar provision for all aliens willing to work in positions defined by the U.S. Army as "shortage positions." It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization, such as those willing to join the U.S. military. *Id.* at 217.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The director concluded that the petitioner's claim was impermissibly based on a shortage of U.S. workers willing to perform the same services and qualifications that could be listed on an application for alien employment certification. On appeal, counsel makes no attempt to explain how the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Rather, counsel asserts broadly that "if it's good for the U.S., an employer, and therefore a labor certification is not required." Counsel provides no legal authority for this

proposition as a useful means of evaluating an individual petition in lieu of the specific considerations set forth in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

Counsel asserts that the petitioner's Master's degree is "above that ordinarily encountered in the field" and that, thus, the petitioner possesses exceptional ability and expertise "that can contribute to national security." Counsel concludes that because the petitioner is an alien of exceptional ability, the director's decision to deny the national interest waiver was in error.

First, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides that an alien of exceptional ability must meet at least *three* of the regulatory criteria. A degree is only one criterion. Moreover, section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, the law and the pertinent regulations explicitly contradict counsel's assertion that the petitioner is an alien of exceptional ability solely because he has an advanced degree. Regardless, exceptional ability is a classification that normally requires an alien employment certification. We cannot conclude that meeting one of the regulatory criteria, or even the requisite three, warrants a waiver of that requirement. *See generally id.* at 222.

While the petitioner has submitted letters from Army recruiters speculating as to the future benefit of the petitioner's work, the record lacks any evidence of the petitioner's past accomplishments, a necessary element. *Id.* at 219. We acknowledge that the petitioner has a Master's degree. Academic performance, however, as measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Id.* at 222, n.6. The petitioner claims that he is the author of a book "published in 2004." He does not indicate, however, that the book is available anywhere other than the library of the school that accepted this "book" as his thesis. Without evidence of the impact this book has had, such as references to it in other media, we cannot conclude that this book represents the petitioner's track record of success in the field. Thus, the assertions from the Army recruiters that the petitioner's future work will benefit the national interest are pure speculation.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job

offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.